No. 84-1253

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SUPREME COURT OF THE UNITED STATES

October Term, 1984

KENNETH R. GEORGE and ALBERTA W. GEORGE - - - - Petitioners,

versus

LIBERTY NATIONAL BANK & TRUST COMPANY OF LOUISVILLE - - Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

D. PAUL ALAGIA, JR.
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LIST OF ALL PARTIES

The petitioners in this matter are Kenneth R. George and Alberta W. George. (Sometimes hereinafter referred to as the "Georges").

The respondent in this matter is Liberty National Bank & Trust Company of Louisville. (Hereinafter referred to as "Liberty"). Liberty is a national bank located in Louisville, Kentucky. Its parent corporation is Liberty United Bancorp, Inc. Liberty has no affiliates, and has no subsidiaries other than wholly-owned subsidiaries.

On December 23, 1982, Liberty acquired and merged with another bank which was its predecessor in interest regarding this matter. This predecessor in interest was United Kentucky Bank, Inc. ("UKB"). The respondent in this matter proceeded in the Kentucky state courts under the name of United Kentucky Bank, Inc. For the sake of consistency with the caption, the name Liberty is used throughout this response, even though the respondent is referred to in the Georges' petition, as well as in the appendices of both petitioners' and respondent, as United Kentucky Bank, Inc., or UKB.

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CITATION TO JUDGMENT AND OPINION BELOW

The Jefferson Circuit Court, a Kentucky state trial court of general jurisdiction, entered a judgment in favor of Liberty on October 25, 1982. This judgment is reproduced in the Georges' petition for writ of certiorari as petitioners' appendix F. The Jefferson Circuit Court subsequently entered a final order of sale which adjudicated the validity of certain real estate mortgages granted by the Georges to Liberty and ordered the encumbered property sold. But this subsequent order of sale is not directly involved in the issue presented by the Georges in their petition for writ of certiorari.

The Kentucky Court of Appeals reviewed the judgment and order of sale of the Jefferson Circuit Court, and on February 24, 1984 issued an unpublished writ-

ten opinion affirming in part and reversing in part. The opinion of the Kentucky Court of Appeals is reproduced as petitioners' appendix H.

On November 8, 1984, the Kentucky Supreme Court entered an order denying the Georges' motion for discretionary review by the Kentucky Supreme Court. This order is reproduced as petitioners' appendix L.

STATEMENT CONCERNING JURISDICTION

Liberty respectfully suggests that this Court lacks jurisdiction to re-examine the final opinion of the Kentucky Court of Appeals because the Georges never raised a federal constitutional issue in any of the state proceedings below.

As this Court stated in *Webb* v. *Webb,* 451 U. S. 493 (1981), it is a long-settled rule that the jurisdiction of this Court to re-examine the final opinion of a state court arises only if the record as a whole shows that the federal claim was adequately presented in the state system. 451 U. S. at 496-497, citing *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928); *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 655 (1897). This Court has consistently refused to decide federal constitutional issues raised in this Court for the first time. 451 U. S. 498-499, citing *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969); *Tacon* v. *Arizona,* 410 U. S. 351, 352 (1973); *Moore* v. *Illinois,* 408 U. S. 786, 799 (1972); *Stanley* v. *Illinois,* 405 U. S. 645, 658 (1972); *Hill* v. *California,* 401 U. S. 797 (1971); *University of California Regents* v. *Bakke,* 438 U. S. 265,

283 (1978). The principles behind this rule are based on the comity which must be observed in our federal system. 451 U. S. at 499-500.

This rule is also consistent with the plain language of 28 U.S.C. §1257(3), the statute empowering this Court to review state court judgments by writ of certiorari. The statutes required the Georges in state court to have "specially set up or claimed under the Constitution . . . of . . . the United States" the right they now seek to have this Court enforce. 451 U. S. at 495.

The petitioners *never* raised a federal constitutional issue in any of the Kentucky state court proceedings below. The Fourteenth Amendment procedural due process and equal protection issues appeared for the first time in the petition for writ of certiorari filed in this Court.

This will be fully discussed in the sections of our response which follow. Liberty again respectfully suggests that the Court lacks jurisdiction to re-examine the final opinion of the Kentucky Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

For the reasons previously stated in Liberty's jurisdictional statement, there are no federal constitutional provisions, statutes, treaties or regulations involved in this case.

STATEMENT OF THE CASE

The Georges' petition for a writ of certiorari is based on the timeliness of two affidavits containing

mathematical calculations which were submitted by Liberty in support of a motion for summary judgment. The relevant facts concern the course of the state court proceedings below. These proceedings consumed in excess of a year at the trial court level, and in excess of a year in the state appellate courts.

The state court proceedings started in the Jefferson Circuit Court on October 27, 1981, when Liberty filed its complaint. This state court action was an action to collect in excess of $2 million loaned to the Georges by Liberty. This debt was evidenced by a number of promissory notes and secured by various real estate mortgages.

Before filing an answer in state court, the Georges on January 11, 1982 filed a separate action against Liberty in the U. S. District Court for the Western District of Kentucky, filed a petition for removal which removed the state court proceedings below to the same U. S. District Court, then filed a perfunctory answer in the federal court action commenced by the removal. The U. S. District Court promptly remanded the state court proceeding back to state court, because there was no jurisdictional basis for the removal.

The Georges, now back in state court, filed a "supplemental answer" on March 1, 1982. This state court answer expressly incorporated all allegations of the January 11, 1982 complaint which initiated the separate federal court action against Liberty. This supplemental answer and relevant portions of the January 11, 1982 federal court complaint are reproduced as respondent's appendix A.

The supplemental answer raised the defenses which were litigated in the state court by the Georges and Liberty. These defenses involved the validity of Liberty's prime rate lending practices. Specifically, the promissory notes in issue included interest at a variable rate expressed on the notes as Liberty's prime lending rate plus an additional percentage. This additional percentage varied, according to the particular note, from ½% to 1½%. When Liberty adjusted its prime rate up or down, the rate of interest on the notes changed accordingly. Liberty's policy was to establish its prime interest rate in relation to the prime interest rates of the eight largest New York City banks. When the prime interest rates of four of these eight banks moved up or down, Liberty changed its rate accordingly.

The Georges' supplemental answer accused Liberty of breach of contract and fraud based on allegations that the Georges were charged Liberty's published prime interest rate at the same time other borrowers were allowed to borrow money from Liberty at lower rates. In essence, the Georges said that Liberty's "true" prime rate was different from its published prime rate. The Georges also claimed that Liberty's prime interest rate was unenforceable and illusory, since Liberty had discretion to move it up or down.

The Georges' supplemental answer also challenged Liberty's use of the 365/360 method of calculating interest -- a method in which interest for one quarter, one half or three quarters of a year is calculated by dividing the actual number of days by 90, 180 or 270,

round numbers used for ease of calculation The Georges likewise claimed that use of the 365/360 method of calculation constituted a breach of contract and fraud.

After the filing of the supplemental answer on March 1, 1982, the case entered a period during which both sides took extensive discovery. Discovery included interrogatories, requests for production of documents, and depositions, all as permitted by the Kentucky Rules of Civil Procedure 26 through 37.

Among the documents produced to the Georges was a computer record called a "note history" for each of their promissory notes. These note histories showed payments and charges of both principal and interest. The Georges also received a list which showed Liberty's published prime interest rate as it changed from time to time from October 31, 1978 through at least July 20, 1982. This list also showed the date of each change. In short, the Georges received information concerning the amount of principal and interest Liberty was claiming on their variable prime interest rate loans.

The Georges' discovery requests included a request that Liberty produce documents concerning loans to other borrowers. Liberty was reluctant to provide such documents absent a satisfactory agreement limiting the volume of documents it was required to produce, and also protecting the confidentiality of the documents. No agreement could be reached. So Liberty then filed a motion for a protective order and the Georges filed a memorandum in opposition. This dis-

covery dispute — concerning the financial records of borrowers *other than* the Georges — was the subject of an August 16, 1982 hearing before the trial court. Part of the transcript of this hearing is referred to and quoted in a misleading way in the petition for writ of certiorari. (See petition, pages 6, 9, 12 and petitioners' appendix A).

At page 12 of this August 16, 1982 hearing transcript is the reference to the March 31, 1981 cut-off date which is prominently mentioned in the petition for writ of certiorari. First, as explained above, this date only concerned a limitation on documents dealing with Liberty's business transactions with borrowers other than the Georges. Second, Liberty agreed to produce documents concerning other borrowers from March 31, 1981 back through the time period covered by the loans to the Georges. (See the portion of this August 16, 1982 hearing transcript which is reproduced as appendix B to this response.)

Moreover, counsel for the Georges admitted in this August 16, 1982 hearing that Liberty had given him and the Georges the document we have mentioned above, which listed changes in Liberty's published prime interest rate. (See respondent's appendix B.) The colloquy at this August 16, 1982 hearing also shows that the Georges' theory of the case was that Liberty's "true" prime interest rate was something other than its published prime rate. (Respondent's appendix B.)

After this hearing, on August 20, 1982, Liberty filed an extensive motion for summary judgment supported by an affidavit from a Liberty loan officer

explaining how Liberty established and changed its prime rate. The trial court heard arguments of counsel regarding summary judgment on at least two occasions — October 11, 1982 and October 21, 1982.

The second hearing was held because during the argument of October 11, 1982, counsel for the Georges indicated that their search through the loan records of other borrowers had uncovered "101 loans" they suspected were variable interest rate loans ostensibly tied to Liberty's published prime rate, but in fact made at a lower rate than the published prime.

However, on the second day of argument, October 21, 1982, the Georges filed a stipulation admitting that each of these 101 loans was either not a prime rate loan, or was based on the same published prime rate charged the Georges. (This stipulation is reproduced as respondent's appendix C.) This stipulation cleared the way for summary judgment.

During the second hearing, Liberty tendered the affidavits of two bank officers. These are the affidavits of which the petitioners complain. In these affidavits the bank officers stated that they had computed and verified the amount of principal and interest owed by the Georges, and the affidavits gave the principal and interest due on each of the notes as of October 15, 1982. Counsel for the Georges asked for 10 days to file any counter-affidavits. The trial court did not grant 10 days, but indicated that since the final judgment and order of sale were going to be referred to the trial commissioner for checking of calculations, descriptions of real property encumbered by the mortgages,

and other details, the Georges would have a short time in which to respond. (See the portion of the October 21, 1982 hearing transcript which is reproduced as respondent's appendix D.)

Summary judgment was entered on October 25, 1982. The judgment held that the promissory notes were valid and that Liberty was entitled to interest on the notes calculated at Liberty's published prime rate. The judgment held for the Georges on the limited issue of the 365/360 method of interest calculation. The trial court found that interest should have been calculated on a 365/365 basis, and the trial court consequently reduced the interest the Georges were obligated to pay by $11,022.58. The summary judgment is reproduced as petitioners' appendix F.

On November 4, 1982, the Georges filed in the trial court a motion to alter, amend or vacate the summary judgment. This motion did not even directly mention the question of the timeliness of the bank officers' affidavits which were tendered at the October 21, 1982 hearing, much less mention the question as one involving the United States Constitution.

The Georges did not file counter-affidavits, did not take any post-judgment discovery concerning the amount of principal and interest stated in Liberty's affidavits, or take any other action to seriously question the accuracy of Liberty's calculations.

On November 12, 1982 (approximately three weeks after Liberty received its summary judgment), the Georges filed a Chapter 11 voluntary bankruptcy petition in the United States District Court, Middle Dis-

trict of Florida, Tampa Division. On November 15, 1982, the Georges filed a notice of the stay imposed by the bankruptcy court preventing Liberty from any further proceedings.

On November 24, 1982, the Georges filed their notice of appeal. After removal of the automatic stay by the bankruptcy court, Liberty filed its notice of cross-appeal on February 16, 1983.

The Georges and Liberty then pursued the appeals to the Kentucky Court of Appeals. The relevant portion of their appellate brief is reproduced in their petition as appendix G. In the brief, the question of the timeliness of the affidavits is raised, but only as a question of the proper application of the Kentucky Rules of Civil Procedure — not as a question arising under the United States Constitution.

The Kentucky Court of Appeals issued an opinion on February 24, 1984 affirming in part and reversing in part. The Court of Appeals remanded the case on the limited issue of the manner in which the $11,022.58 interest credit was calculated. This credit to the Georges resulted from the trial court's finding that interest should have been calculated on a 365/365 basis, rather than a 365/360 basis. The Court of Appeals' opinion is reproduced as petitioner's appendix H.

Subsequently, the Georges filed two more pleadings in the Kentucky appellate courts. The first was a petition for a rehearing filed in the Kentucky Court of Appeals. (The relevant portion of this pleading is reproduced as petitioners' appendix I.) This petition

mentions the question of the timeliness of the affidavits, but again only as a question concerning the Kentucky Rules of Civil Procedure — not as a question involving procedural due process or equal protection guaranteed under the United States Constitution.

After the petition for rehearing was denied by the Kentucky Court of Appeals, the Georges on July 18, 1984, filed a motion for discretionary review in the Kentucky Supreme Court. (The relevant portion of this motion is reproduced as petitioner's appendix K.) Again, the Georges mentioned the question of the timeliness of the affidavits, but only as a question involving the Kentucky Rules of Civil Procedure — not as a federal constitutional question.

The Kentucky Supreme Court entered an order on November 8, 1984 denying the Georges' motion for discretionary review. (Reproduced as petitioners' appendix L.)

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to re-examine the final opinion of Kentucky Court of Appeals, because the Georges never raised an issue concerning the federal constitution in any of the Kentucky state court proceedings below. By virtue of 28 U.S.C. §1257(3) and according to the reasoning of this Court in many of its past opinions, a federal constitutional issue never raised in the state courts cannot be raised here for the first time.

The state court proceedings satisfied all requirements of procedural due process and equal protection of the laws to which the Georges were entitled by virtue of the Fourteenth Amendment. The Georges had in excess of two years of civil litigation in the Kentucky state courts. They filed pleadings setting up defenses, they conducted extensive discovery, and were heard on more than one occasion concerning their objections to Liberty's motion for summary judgment. The objection to the timeliness of affidavits which the Georges raised is an insubstantial objection which was raised only in hopes of creating further delay. The state court proceedings in no way violated any of the procedural safeguards guaranteed by the U. S. Constitution.

Implicit in what has been said is that there is no reason of the type given in United States Supreme Court Rule 17.1 for this Court to grant review on certiorari.

ARGUMENT

I. Since the Georges Never Raised a Question Under the U. S. Constitution in the Kentucky State Courts, This Court Lacks Jurisdiction to Grant a Writ of Certiorari.

In the statement concerning jurisdiction above, Liberty suggested that this Court lacks jurisdiction to re-examine the final opinion of the Kentucky Court of Appeals because the Georges never raised an issue under the U. S. Constitution in any of the state court proceedings. In *Webb* v. *Webb,* 451 U. S. 493 (1981), this Court reviewed the long-standing rules which require that a federal question be explicitly raised in

the state court proceedings in order to invoke jurisdiction under 28 U.S.C. §1257(3). 451 U. S. at 496-497, citing *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928); *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648 (1897). This Court has consistently refused to decide federal constitutional issues raised in this Court for the first time. 451 U. S. at 498-499, citing *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969); *Tacon* v. *Arizona,* 410 U. S. 351, 352 (1973); *Moore* v. *Illinois,* 408 U. S. 786, 799 (1972); *Stanley* v. *Illinois,* 405 U. S. 645, 658 (1972); *Hill* v. *California,* 401 U. S. 797 (1971); *University of California Regents* v. *Bakke,* 438 U. S. 265, 283 (1978). The principles behind this rule are based on the comity which must be observed in our federal system. 451 U. S. 499-500.

The Georges' jurisdictional statement at pages 2 and 3 of their petition for writ of certiorari, and the appendices to their petition, clearly show that they never raised a question under the United States Constitution at any stage of the state court proceedings.

28 U.S.C. §1257(3) grants jurisdiction to review these Kentucky state court proceedings only if in state court the Georges "specially set up or claimed under the Constitution . . . of . . . the United States" the rights which they now seek to have this Court enforce. Moreover, United State Supreme Court Rule 21.1(h) required the Georges to "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised."

The fact that the Georges' jurisdictional statement does not comply with this requirement is a clear indication that the Georges never raised a federal constitutional question in the state court proceedings below. The Georges jurisdictional statement makes vague references, carefully phrased to avoid outright falsehood, to the stages of proceedings below at which they raised the "issue" presented in the petition for writ of certiorari. What the Georges do not say is that the "isssue" of the timeliness of the affidavits, which they present for the first time as a federal constitutional problem here, was never presented as anything more than a question of Kentucky civil procedure in any of the proceedings below.

After the affidavits of which the Georges complain were tendered, the Georges filed in the state trial court an extensive motion to alter, amend or vacate the judgment. They afterward filed a complete set of b iefs (petitioners' appendix G) plus a petition for rehearing (petitioners' appendix I) in the Kentucky Court of Appeals. They also filed a motion for discretionary review in the Kentucky Supreme Court. (Petitioners' appendix K). Not one of these pleadings makes any reference to a deprivation of procedural due process or equal protection under the United States Constitution. The Georges never presented the problem of the timeliness of the affidavits as anything more than a question of the proper application of the Kentucky Rules of Civil Procedure.

The Georges failed to properly raise or preserve any claim under the Fourteenth Amendment of the

United States Constitution and therefore this Court lacks jurisdiction to re-examine the decision of the Kentucky Court of Appeals.

II. The Kentucky State Court Proceedings Fully Satisfied the Requirements of Procedural Due Process Guaranteed by the Fourteenth Amendment.

Since this action arises from the Kentucky state courts rather than the federal courts, the question here is the narrow one of due process and not the broad exercise of supervisory power that this Court would possess in regard to its own trial court. As this Court has observed, not every trial court infirmity which might call for the application of supervisory powers correspondingly constitutes a denial of the minimum procedural due process required by the United States Constitution. *Donnelly* v. *DeChristoforo,* 416 U. S. 637, 642 (1974). The question is not whether the Kentucky courts have misapplied Kentucky law, it is whether the state court procedures actually followed afforded the petitioners the minimum procedural due process required by the Fourteenth Amendment. *Howard* v. *Kentucky,* 200 U. S. 164 (1906).[1] The requirements of procedural due process do not include every technical objection which a party may have. The requirements of procedural due process are not to be trivialized by formal objections which have no substantial bearing on the rights of parties. *Market Street*

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[1]This Court has continued to recognize that a state court has the final authority to interpret that state's laws. *Brown* v. *Ohio,* 432 U. S. 161, 167 (1977).

Railway Co. v. *Railroad Commission of State of California,* 324 U. S. 548, 562 (1945).

This Court has long recognized that the Fourteenth Amendment does not guarantee to the citizens of a state any particular form or method of state procedure —it simply guarantees notice and an opportunity to be heard commensurate with the character of rights which may be affected. *Dohany* v. *Rogers,* 281 U. S. 362 (1930). More recently, this Court has said that due process is a flexible concept, the requirements of which depend on all the circumstances surrounding a particular situation. *Matthews* v. *Eldridge,* 424 U. S. 319, 334-335 (1976). The question of whether procedural due process was satisfied depends on three factors: (1) the private interests that were affected by the official action, (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of any additional procedural safeguards, and (3) the government's interest in providing additional or substitute procedural requirements. *Id.,* at 334-335.

Here, the private interests affected included not only the interests of the Georges, but the interests of Liberty. The amount of money involved—in excess of two million dollars—was substantial when viewed from the perspective of either side. Interest continued to accrue throughout the litigation.

As to the second factor, apart from the risk of good faith error which is common to all human endeavor, there was no risk of an erroneous deprivation through the procedures used. The state court proceeding was

a full-blown civil action conducted in the Kentucky state courts. The persons charged with making the decisions at the trial level and on appeal were experienced judges. Civil actions in Kentucky are governed by a comprehensive set of procedural rules which, with minor variations, are patterned after the Federal Rules of Civil Procedure.

This civil action consumed over a year in the trial court alone. Both the Georges and Liberty exercised the right to take discovery by way of depositions, requests for production of documents, and interrogatories. As previously discussed, during discovery Liberty provided the Georges with a note history concerning each of their notes. The note history showed payments and charges of both principal and interest. Liberty also provided the Georges with a list which showed Liberty's published prime interest rate as it changed from time to time from October 31, 1978 through at least July 20, 1982. This list also showed the date of each change. At the August 16, 1982, discovery hearing, counsel for the Georges admitted receiving this list. (See respondent's appendix B).

In light of all the circumstances, Liberty's submission of the affidavits during the second day of argument on the summary judgment motion did not surprise or prejudice the Georges, nor did it create an unreasonable risk or error. The affidavits contained nothing more than the calculation by Liberty bank officers of the amount due and owing as of October 15, 1982. (See petitioners' appendices C and D). The real dispute in this case did not concern arithmetic, it concerned the

validity of the promissory notes and the enforceability of Liberty's published prime interest rate. The Georges' theory of the case was that Liberty's "true" prime interest rate was something other than (and less than) its published prime interest rate. (See respondent's appendix B). The Georges' discovery was aimed at uncovering a loan to another similarly situated borrower which was made at a prime rate lower than the published prime interest rate Liberty charged the Georges. After reviewing a substantial number of loans to other borrowers, the Georges found no such loans and stipulated to that effect. (See respondent's appendix C).

Once the trial court judge determined that the prommissory notes were valid and that Liberty was entitled to interest at its published prime interest rate, the exact amount due became a matter of simple arithmetic.

When considered in light of all the circumstances, it is clear that any objection to the timeliness of the affidavits was nothing more than a dilatory objection designed to delay entry of judgment in a collection case. The only serious purpose behind the objection, then and now, is delay.

The third factor considered in analyzing whether the requirements of procedural due process have been satisfied is the government's interests, including the function involved and the burden additional procedures would entail. There is no question that the fair adjudication of civil disputes in the Kentucky state courts is of paramount importance to the government

as well as to the litigants involved. The government also has an interest in ending litigation once it becomes clear that "no genuine issue of material fact" exists. This interest is reflected in Kentucky Rule of Civil Procedure 56.03.[2] The government also has an interest in guaranteeing that form is not exalted over substance in the resolution of civil cases. This interest is reflected in Kentucky Rule of Civil Procedure 6.02,[3] which gives the trial judge discretion to enlarge the time for filing affidavits, and by Kentucky Rule of Civil Procedure 61.01,[4] which directs the courts to ignore any procedural irregularity which does not affect the substantial rights of the parties.

When all the factors are considered, there is no question that the procedural due process rights guaranteed the Georges by the United States Constitution were satisfied by the two years of civil litigation in the Kentucky state courts. Indeed, the procedural protection they received was far in excess of anything required by the Fourteenth Amendment. The Kentucky Court of Appeals has refused to set aside the trial court's judgment even though the Georges argued that the tendered affidavits violated the Kentucky Rules of Civil Procedure. Therefore, all procedural requirements of Kentucky law were satisfied as well.

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[2]This rule is identical to Fed. R. Civ. P. 56(c).

[3]This rule is identical to Fed. R. Civ. P. 6(b), except the Kentucky Rule begins as follows: "When *by statute or* by these Rules or by a notice given thereunder or by order of court an act is required . . . ."

[4]This rule, Kentucky's harmless error rule, is identical to Fed. R. Civ. P. 61.

For all the reasons discussed above, the Georges were not deprived of any procedural rights guaranteed by the due process clause of the Fourteenth Amendment.

III. The Kentucky State Proceedings Fully Satisfied the Requirements of the Equal Protection Clause of the Fourteenth Amendment.

The Georges' petition for writ of certiorari also argues that the Kentucky state court proceedings denied them the equal protection of the laws. This Court in *Beck* v. *Washington,* 369 U.S. 541 (1962) had occassion to consider a similar argument.

This Court noted that an alleged deprivation of the equal protection of the laws based on an alleged procedural irregularity is built on the premise that an individual was singled out for special unfair treatment by being denied a procedural right afforded others under state law. Here, there is no question that this premise is false. The Kentucky courts have considered the Georges argument, which was couched exclusively in terms of the Kentucky Rules of Civil Procedure, and have refused to set aside the trial court's judgment based on their objection concerning the timeliness of the affidavits. As to questions of purely Kentucky law, this Court defers to the opinion expressed by the Kentucky courts. *Dohany* v. *Rogers, supra,* at 365; *Brown* v. *Ohio, supra,* at 167.

In *Beck* v. *Washington,* this Court also stated that the federal guarantee of equal protection of the laws does not guarantee uniformity in the application of state procedures, nor even immunity from error in the

application of state procedural law. 369 U. S. at 554-555, citing *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin ex rel. Milwaukee,* 252 U. S. 100, 106 (1920). This Court also observed that to reverse a state court based on an allegation of procedural irregularity, unaccompanied by any showing that the ultimate end of regular proceedings—a fair hearing—was not obtained, would be to exalt form over substance contrary to this Court's previous application of the equal protection clause. *Id.,* citing *Graham* v. *West Virginia,* 224 U. S. 616, 630 (1912).

For all the reasons discussed above, the Kentucky state court proceedings were entirely fair and satisfied all requirements of the equal protection clause of the Fourteenth Amendment.

CONCLUSION

In addition to lack of jurisdiction, there is no reason of the type given in United States Supreme Court Rule 17.1 for this Court to grant review on certiorari. For the reasons discussed in this response to the Georges' petition for certiorari, Liberty National Bank & Trust Company of Louisville respectfully requests this Court to deny the Georges' petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 81CI-09925

UNITED KENTUCKY BANK (formerly doing business as The Louisville Trust Bank) - *Plaintiff*

v.

KENNETH R. GEORGE, et al. - - - *Defendants*

SUPPLEMENTAL ANSWER—Filed March 1, 1982

In addition to its Answer and Defenses set up in the Answer filed of record in this action, and in the United States District Court for the Western District of Kentucky, Case No. C82-0026L(b), the Defendants show as their additional and Supplemental Answer the following:

1. The Complaint fails to state any cause of action for relief against Defendant YORKTOWN SEWAGE TREATMENT FACILITIES, INC.

2. With regard to the Exhibits Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, the Defendants KENNETH R. GEORGE and ALBERTA W. GEORGE admit the execution of the same, as specified in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 20 and 21 of the Complaint.

3. All other allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 20 and 21 are denied, and strict proof thereof is demanded.

4. The allegations contained in Paragraphs 11, 12, 13, 14, 15, 16, 17, 18 and 19 are denied, and strict proof thereof is demanded.

5. The prayer and demand is fully and completely denied by the Defendants.

6. That Defendants KENNETH R. GEORGE and ALBERTA W. GEORGE on or about the 12th day of January, 1982, did file Civil Action Number 82-0021L(a) in the United States District Court for the Western District of Kentucky against UNITED KENTUCKY BANK and UNITED KENTUCKY, INC. and others, raising substantial claims against the Plaintiff herein and said other defendants, arising out of the same series of transactions upon which Plaintiff's Complaint is based. Without waiving their rights to go forward to make their claims in the United States District Court, said Defendants KENNETH R. GEORGE and ALBERTA W. GEORGE show as additional defenses to the claims of the Plaintiff herein, breach of contract, both by way of calculation of the "prime rate" and calculation of the actual interest itself, fraud, breach of fiduciary duty, and violation of KRS 365.50, all as more particularly described in the copy of said Complaint, attached hereto, incorporated by reference herein, as described, and marked as Exhibit "A".

7. The Answer filed by Defendants in this action while the same was before the United States District Court is appended hereto.

WHEREFORE, Defendants having fully Answered and set out their defenses, pray for Judgment in their favor upon Plaintiff's Complaint, plus all costs of this action and jury trial.

Respectfully,

Bornstein & Oppenheimer
By:

(s) William Bornstein
William Bornstein
808 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-6612
Attorneys for Defendants
Kenneth R. George, Alberta W. George, Yorktown Sewage Treatment Facilities, Inc., and
Kenneth R. George, d/b/a
Yorktown Lumber Company

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the within and foregoing pleading upon all counsel of record by depositing a copy of the same in the United States Postal Service, with sufficient postage affixed to assure delivery this the 1 day of March, 1982.

(s) William Bornstein

APPENDIX A (continued)

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

Civil Action File No. 8-2-0021-L(A)
Jury Trial Demanded

KENNETH R. GEORGE and
ALBERTA W. GEORGE, - - - - - *Plaintiffs*

v.

UNITED KENTUCKY BANK,
UNITED KENTUCKY, INC.,
and DOES 1 through 99, - - - *Defendants*

COMPLAINT
RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS ACT, ANTITRUST, BREACH OF CONTRACT, FRAUD, BREACH OF FIDUCIARY DUTY

COME Now Plaintiffs, and for their claims against Defendant UNITED KENTUCKY BANK, [BANK], Defendant UNITED KENTUCKY, INC. ["HOLDING CORPORATION"], and DOES 1 through 99, alleges and states as follows:

I. PRELIMINARY STATEMENT

This is an action brought by the Plaintiffs, KENNETH R. GEORGE and ALBERTA W. GEORGE [collectively Plaintiffs "GEORGE"], to recover statutory damages for violations by Defendants, BANK, HOLDING CORPORATION, and DOES 1 through 99, under (1) the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §1962 and (2) the Sherman Antitrust Act, 15 U.S.C. §1. In addition, Plaintiffs GEORGE seek to recover damages for breach of contract, fraud, and breach of fiduciary duty. A jury trial is demanded on all claims.

* * * * * * *

IV. INTRODUCTION

5. Defendant BANK and Defendant HOLDING CORPORATION, together with Does 1 through 99, are an enterprise which is engaged in and whose activities affect interstate commerce.

6. Commencing on or about October 26, 1978, Plaintiffs GEORGE began a series of borrowing transactions with Defendant BANK.

7. The borrower(s), sums and dates of the aforesaid borrowing transactions are as follows:

Note No.	Borrower(s)	Date	Amount
1	Kenneth R. George and Alberta W. George	10/26/78	$ 750,000.00
2	Kenneth R. George and Alberta W. George	10/26/78	$1,500,000.00
3	Kenneth R. George and Alberta W. George	10/26/78	$ 250,000.00
4	Kenneth R. George and Alberta W. George d/b/a Yorktown Lumber Company	06/04/79	$ 150,000.00
5	Kenneth R. George and Alberta W. George d/b/a Yorktown Lumber Company	11/24/80	$ 50,000.00

8. That copies of the documents evidencing the borrowing transactions between the parties in the form of the Notes designated 1 through 5 above are appended hereto and marked as Exhibits "A" through "E", respectively.

9. The parties continued in their relationship from October 26, 1978 through and including the date of this Complaint, with Plaintiffs GEORGE being the borrowers of various sums, upon which substantial principal and interest payments have been made.

10. That in the above loans obtained by Plaintiffs GEORGE, it was agreed that Plaintiffs GEORGE would be charged interest based upon a specific percentage over Defendant BANK's "prime rate".

11. In the above loans obtained by Plaintiffs GEORGE, it was agreed that Plaintiffs GEORGE would be charged interest based upon a "per annum" or Annual Percentage Rate basis when, in actuality, the interest rate computed by Defendant BANK was higher than the agreed rate.

12. Throughout the entire period of the borrowing relationship described above between Plaintiffs GEORGE and Defendant BANK, Defendant BANK knowingly computed and charged Plaintiffs GEORGE more interest than allowed by the agreement by failing to calculate interest based upon the BANK's true "prime rate".

13. Throughout the entire period of the borrowing relationship described above between Plaintiffs GEORGE and Defendant BANK, Defendant BANK knowingly computed and charged Plaintiffs GEORGE more interest than allowed by the agreement by computing interest based upon actual days divided by 360 rather than actual days divided by 365.

V. COUNT ONE

FIRST COUNT

STATING A CLAIM AGAINST DEFENDANT BANK, DEFENDANT HOLDING COMPANY AND DEFENDANTS DOES 1 through 99 UNDER §1964 OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT FOR ENGAGING IN A RACKETEERING ACTIVITY BY CHARGING MORE THAN THE PRIME RATE

14. The averments of the previously numbered paragraphs of this Complaint are incorporated by reference herein.

15. During the entire period of the business relationship between Plaintiffs GEORGE and Defendant BANK, Defendant BANK, at the direction and behest of Defendant HOLDING COMPANY and one or more of the Defendants DOES 1 through 99, all in conduct of the affairs of the enterprise, knowingly computed and charged Plaintiffs GEORGE interest on its loans at rates greater than the agreed upon rate.

16. During this period of time, Defendant BANK falsely and fraudulently represented to Plaintiffs GEORGE that the rate charged was based on or tied to its "prime rate", i.e., BANK's "prime lending rate", when the rate it, in fact, charged Plaintiffs GEORGE was higher than the agreed upon rate.

17. Defendant BANK's failure to disclose the rate it charged as its "prime lending rate" or best rate, and its failure to charge Plaintiffs GEORGE the agreed upon rate constituted a scheme to obtain interest from Plaintiffs GEORGE by means of false and fraudulent pretenses.

18. In consequence of the foregoing, and in reliance thereon, to their detriment, Plaintiffs GEORGE paid Defendant BANK interest higher than the agreed upon rate.

* * * * * * *

VI. SECOND COUNT

STATING A CLAIM AGAINST DEFENDANT BANK UNDER §1964 OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT FOR ENGAGING IN A RACKETEERING ACTIVITY BY USING THE UNDISCLOSED 365/360 METHOD OF CALCULATING INTEREST

21. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

22. Plaintiffs GEORGE were, during the entire course of the specified relationship with Defendant BANK from October 26, 1978 to date, indebted to Defendant BANK for certain sums of money upon which loans Plaintiffs GEORGE agreed to pay a specified interest rate on a "per annum" or Annual Percentage Rate basis.

23. During this period of time, Defendant BANK, in conducting the affairs of the enterprise, aided and abetted by Defendant HOLDING COMPANY and Defendants DOES 1 through 99, knowingly computed and charged Plaintiffs GEORGE a rate greater than agreed upon or disclosed to the Plaintiffs.

24. During this period of time, Defendant BANK falsely and fraudulently represented to Plaintiffs GEORGE that it was computing interest on a "per annum" or Annual Percentage Rate basis, when in fact, the rate it was charging was greater than the disclosed rate by virtue of its use of the undisclosed 365/360 method.

25. Defendant BANK's failure to disclose this correct interest rate constituted a scheme to obtain interest from Plaintiffs GEORGE by means of false and fraudulent pretenses.

26. In consequence of the foregoing, and in reliance thereon, to their detriment, Plaintiffs GEORGE paid Defendant BANK interest higher than the agreed upon rate.

* * * * * * *

VIII. FOURTH COUNT

STATING A CLAIM AGAINST DEFENDANT BANK FOR BREACH OF CONTRACT BY CHARGING HIGHER INTEREST THAN THE AGREED UPON PRIME RATE

39. The averments of the previously numbered paragraphs are incorporated herein by reference.

40. By virtue of the above described acts and practices, Defendant BANK agreed that it would impose an interest rate based upon its "prime lending rate" or best rate, but, in fact, charged and received a rate substantially in excess of that rate, in violation of its loan agreements.

41. In consequence of the foregoing, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount they, in fact, paid.

IX. FIFTH COUNT

STATING A CLAIM AGAINST THE DEFENDANT BANK FOR BREACH OF CONTRACT BY COMPUTING INTEREST BY USE OF THE 365/360 METHOD

42. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

43. By virtue of the above described acts and practices, Defendant BANK breached its loan agreements by charging interest on a 365/360 method instead of honoring its contract with Plaintiffs GEORGE, which required interest to be computed on a lower basis of 365/365, "per annum" or Annual Percentage Rate.

44. In consequence of the foregoing, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount they, in fact, paid.

X. SIXTH COUNT

STATING A CLAIM AGAINST THE DEFENDANT BANK FOR FRAUD ARISING OUT OF THE CHARGING OF HIGHER INTEREST THN THE AGREED UPON PRIME RATE

45. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

46. In entering into its contract with Defendant BANK, Plaintiffs GEORGE relied upon the representations contained in the loan agreements whereby Plaintiffs GEORGE were to be charged interest tied to the "prime lending rate" or best rate.

47. Defendant BANK willfully failed and refused to honor its commitments to charge Plaintiffs GEORGE interest tied to its "prime lending rate" or best rate, but, instead, charged and collected interest at a rate higher than a rate tied to its "prime lending rate" or best rate.

48. That by relying upon such representations of Defendant BANK, Plaintiffs GEORGE were damaged in an amount equal to the difference between the amount actually charged and the amount that should have been charged based upon the best rate then in effect.

49. The above described acts and practices of Defendant BANK were wilful and deliberate, constituting a fraud upon Plaintiffs GEORGE.

50. In consequence of the foregoing acts of fraud, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount, in fact, paid, and all consequential damages and all punitive damages, in amounts to be determined after discovery, plus reasonable attorneys' fees and costs of this action.

XI. SEVENTH COUNT

STATING A CLAIM AGAINST DEFENDANT BANK FOR FRAUD ARISING FROM THE COMPUTATION OF INTEREST BY USE OF THE 365/360 METHOD

51. The averments of the previously numbered paragraphs of this Complaint are incorporated herein by reference.

52. In entering into their agreements with Defendant BANK, Plaintiffs GEORGE relied upon the representations

contained in various documents whereby Plaintiffs GEORGE were to be charged interest calculated on a "per annum" or Annual Percentage Rate [365/365 method].

53. Defendant BANK willfully failed and refused to honor its commitments to charge Plaintiffs GEORGE interest calculated on a 365/365 basis, but, instead, charged and collected interest calculated on a differet basis [365/360 method], resulting in higher interest.

54. That by relying upon such representations of Defendant BANK, Plaintiffs GEORGE were damaged in an amount equal to the difference between the amount actually charged and the amount that should have been charged based upon a calculation on the agreed 365/365 method.

55. The above described acts and practices of Defendant BANK were wilful and deliberate, constituting a fraud upon Plaintiffs GEORGE.

56. In consequence of the foregoing acts of fraud, Plaintiffs GEORGE are entitled to recover the difference between the amount agreed to be paid and the amount, in fact, paid, and all consequential damages and all punitive damages, in amounts to be determined after discovery, plus reasonable attorneys' fees and costs of this action.

* * * * * * *

XII. EIGHTH COUNT

STATING A CLAIM AGAINST THE DEFENDANT BANK FOR BREACH OF FIDUCIARY DUTY BY CALCULATING HIGHER INTEREST CHARGES THAN THE AGREED UPON PRIME RATE

* * * * * * *

XIII. NINTH COUNT

STATING A CLAIM AGAINST DEFENDANT BANK FOR BREACH OF FIDUCIARY DUTY IN COMPUTING INTEREST BY USE OF THE 365/360 METHOD

* * * * * * *

* * * * * * *

WHEREFORE, Plaintiffs pray for Judgment against Defendants as specified in each of the eleven (11) counts hereinabove, and trial by jury on all issues.

Kleiner & Merren
(s) By: (Illegible)
Of Counsel for Plaintiffs
The Plaza Towers
2575 Peachtree Road
Atlanta, Georgia 30305
(404) 262-1800

Bornstein & Oppenheimer
(s) By: William S. Bornstein
Attorneys for Plaintiffs
808 Marion E. Taylor Building
Louisville, Kentucky 40202
(502) 589-6612

APPENDIX B

JEFFERSON CIRCUIT COURT

DIVISION FOUR (4)

No. 81 CI 09925

UNITED KENTUCKY BANK (formerly doing business as The Louisville Trust Bank) - *Plaintiff*

v.

KENNETH R. GEORGE, et al. - - - *Defendants*

PROCEEDINGS: HEARING—Filed August 30, 1982

Heard before His Honor Richard A. Revell sitting without a Jury, August 16, 1982, Louisville, Kentucky

Appearances:

For the Plaintiff:

Richard Frockt
Kentucky Home Life Building
Louisville, Kentucky 40202

For the Defendant:

Theodore H. Amshoff
1445 Starks Building
Louisville, Kentucky 40202

John J. Mulrooney
Larry E. Parrish
Parrish & Mulrooney
2125 First Tennessee Building
Memphis, Tennessee 38103

Scott T. Wendelsdorf
730 W. Main
Louisville, Kentucky 40202

Marlene Underwood, Reporter

* * * * * * *

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Mr. Frockt: But the basis of our Protective Order as to the confidentiality. It's a very simple matter from our standpoint is that they are requesting in effect all of the commercial loans and commercial loan practices of United Kentucky Bank from a period 1978 — October 1978 through today. We feel if we have to produce all of this information that that is giving confidential business relationships out. There is information in there that has been discovered for the purposes of this litigation only and should not be used — the purposes of this litigation and discovery process should not be used to further some other goal. We were willing to give them whatever they want — access to whatever they want in the form kept by United Kentucky Bank, the Commercial Loan Process but we want a limit to that use to be the use of those documents in this

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litigation, number one.

Secondly, after the termination of this litigation, final determination that those documents be returned to the bank.

Now, they have offered — and why you think we are getting somewhat close, they have offered to take the information from us deleting any borrowers names or identification.

The Court: Okay.

Mr. Frockt: What that effectively does is make us go through each document — we presume there being close to a hundred thousand of these documents, there are some 5- to 700 customers — and makes us go through each loan file and each document copying each document, deleting then the identification.

The Court: Why not let them take it out?

Mr. Frockt: Because then they would have access to our person.

The Court: Well, I don't think you were concerned with them finding it out, you were conceened with — as I recall your argument before, that they may —

Mr. Frockt: Have other use for it.

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The Court: — Well that they may send it on to somebody else, some creditor or something like that.

Mr. Frockt: Right. And that's why we're saying, we don't mind giving it to them with the information contained in there of the borrower but at the termination of the litigation we want the documents back and we want the documents limited to this litigation.

That's the heart of the initial Protective Order. We can agree to a lot of the matters that we will produce to them and we have agreed on a lot of matters but we cannot seem to agree on how we are going to give them the documents.

The Court: Is ther any problem with returning those documents after the trial is over?

Mr. Parris: Your Honor, we are not interested in having a hundred thousand documents. We have no use for the information except as it may relate to the proceedings here.

However, I think, and I would be subject to correction, but in my experience in other cases similar to this in other place I have found that banks that use the Federal Reserve System, for instance, file a form called FR2028A which is titled Terms of Bank Lending to Businesses, Commercial, Industrial, Construction and Land Development

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Loans and those forms are filed very regularly with the Federal Reserve System and they have listed in order every loan that was made every single day in a horizontal line, it has all the information about that loan that's pertinent to this lawsuit. And what's pertinent to this lawsuit is —

The Court: Are you willing to take just those records?

Mr. Parrish: I am willing to take those records.

The Court: Would that lessen your burden somewhat?

Mr. Frockt: Oh, yes sir. It's a voluntary form. I don't even know if we have filed it, but if we have filed that form we would be willing, deleting the subject —

The Court: Is there any way you can call over to the bank right now and find out if they keep that kind of record?

Mr. Frockt: Yes, Sir.

The Court: You're saying that that would suffice though?

Mr. Parrish: I'm saying that that would suffice insofar as any information we have asked for relative to loans, rates on notes, etc.

The Court: That could be furnished, right, roughly —

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Mr. Frockt: That would be without any problem, Your Honor. As long as we're allowed to either protect that record because that's a competitive record, don't forget. The banking practice in Louisville is of a competitive nature and banks go out and solicit and price these loans on a daily basis, your Honor. We're willing to give it —

The Court: But this is after the fact. I mean you can't go back and — interest rates change daily.

Mr. Frockt: I understand that. As long as it's limited to the time of default, which is what we're saying that it should be limited to. I have no problems producing all of those records. That's fine.

Mr. Parrish: Now limited to time of default, I'm not certain what —

The Court: Well, back how far?

Mr. Frockt: A demand letter on a default was issued in March of 1981, your Honor. And we are saying —

The Court: Okay. But didn't we round this off to the last quarter of '80 and the first quarter of '81?

Mr. Frockt: That's it.

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March of 1981, your Honor.

The Court: Okay. So October, November and December of '80 and January, February and March of 1981.

Mr. Frockt: I'm even willing to go back and provide that record, if we have it, for a period during the time of the loan because that's a quarterly record.

Mr. Parrish: No objection.

The Court: Okay.

Mr. Parrish: Well, I think it is quarterly but in order for us to have the computations we need we need it from the point which the loan was made.

The Court: All right. Okay.

Mr. Parrish: Because it's the interest rate on —

The Court: He's not disagreeing with you so — We had, at a hearing you weren't at, I think we had narrowed something down to the last quarter of '80 and the first quarter of '81.

Mr. Amshoff: Those were the records that Mr. George — Those were the income tax records and the ledger —

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The Court: Well, I was trying to be consistent, do it the same way on these records but if the bank is willing to provide those records on back to the date of the inception of the loan, fine. That's all right.

Mr. Parrish: I have found that those are the easiest documents to work with for both sides and the easiest to produce and the easiest to produce the information that we need. And that's fine.

The Court: Okay.

* * * * * * *

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Mr. Parrish: Well, if it doesn't have the interest rate that is the key factor. Perhaps I can explain to your Honor what our theory is and you can see.

It is our position that the prime rate is an objectively fixed rate of interest and it is fixed by the rate that is extended — the lowest rate extended on any given day becomes the prime rate.

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The Court: The prime, are you talking about the prime interest rate as set by United Kentucky or the prime interest rate as set by the Federal Rerserve or —

Mr. Parrish: Well the Federal Reserve does not set a prime rate. The prime rate is set by United Kentucky and our theory by the extension of credit that they make. As soon as they loan someone the money at a rate less than they loan someone else money they have thereby lowered their prime rate.

The Court: Okay.

Mr. Parrish: And that's why we need to know —

The Court: You're talking about their own prime rate.

Mr. Parrish: — Their own prime rate which is the rate on which Mr. George's interest is tied, for fluctuation purposes, so all we want to know is on every day —

The Court: Did he have a contract that guaranteed him the prime interest rate?

Mr. Parrish: That's correct. That's the whole case.

The Court: That's the note.

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Mr. Parrish: This is very near a Summary Judgment case. I think when we get to the facts there is really not going to be much dispute about the facts and it's what does prime rate mean and we're prepared to put proof on that it means one thing; they say that it means another thing. And they want to limit it to commercial loans. We

say that it applies to all loans. And so all we are seeking is — I don't care who the loan was made to, I don't care anything except what that is.

The Court: Does the bank keep some kind of a tabulation as to what the prime interest rate was at any particular time?

Mr. Frockt: Yes, sir. And that has been — they have that already.

The Court: You all challenge that, you want to go ahead and see what they were lending —

Mr. Parrish: What they have is their published prime and what they claim to be their prime, that's the whole essence of the lawsuit is that we are saying that they are representing as their prime rate something that is different from their actual prime rate. We say the prime rate is set by the lowest interest rate given and they say it is what we say it is. And they have given us a list of what they say it is from time to time.

* * * * * * *

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Mr. Frockt: Let me give you an example, we will — for purposes of argument today admit to this. That today the rate is —

The Court: Whatever.

Mr. Frockt: —15%. There are certain student guaranteed loans that are made by the bank under a government guaranteed program —

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The Court: That are probably 5% or something.

Mr. Frockt: At 5%. There are at times prior to 1980 —

The Court: Well there are all kinds of loans under —

Mr. Frockt: There's usuary limits by the state. There's a $15,000 and under limit that you cannot go above the FED discount rate plus four points; which today would be

under the prime rate. I mean they are statutory mandated loans that would be less than prime rate.

The Court: Why I think they are interested though probably in loans other than government guaranteed or student loans, those kind of things. Remodeling something in the City of Louisville that's guaranteed or something like that that comes in at 10% or 8%, those — I doubt that they are trying to —

Are you all trying to take those into consideration because if you are, I would imagine they are in a different category. I don't think that has anything to do with the prime interest rate.

Mr. Parrish: Well, there were no exceptions made on the representation that was made. We just took a deposition from a loan officer —

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The Court: He's not trying to get his loan down to 5% is he? I mean — more power to him if he can, but —

Mr. Frockt: That's what he's trying to do, your Honor.

Mr. Parrish: Well, if some mechanics can be worked out where we can present this on agreed facts for a legal determination I would suggest that it may save everybody a lot of time and if —

The Court: It really sounds like it ought to be. Now that I'm beginning to see through to the issue, it sounds like it's that kind of a case, really.

* * * * * * *

CERTIFICATE

I, MARLENE UNDERWOOD, Official Court Reporter for the Jefferson Circuit Court, do hereby certify that the foregoing pages represent a full, true, and complete transcript of the proceedings had in the case of United Kentucky Bank vs. Kenneth R. George, et al, had at the time and place set forth in the caption herein.

Given under my hand as Court Reporter this 27th day of August, 1982.

_____

Official Court Reporter

APPENDIX C

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 81 CI-09925

UNITED KENTUCKY BANK, INC. (formerly d/b/a Louisville Trust Bank) - - - *Plaintiff*

v.

KENNETH R. GEORGE, Et Al. - - - *Defendants*

STIPULATIONS OF COUNSEL

Plaintiff, United Kentucky Bank, Inc., and defendants, Kenneth R. George and Alberta W. George, by agreement, hereby stipulate that if called by United Kentucky Bank, Inc., witnesses would testify as follows:

1. That the Senior Loan Committee of United Kentucky Bank approves all extensions of credit in excess of $100,000.00 and reviews credit for those amounts between $50,000.00 to $100,000.00;

2. That it is the responsibility of the individual loan officer(s) to report those loans to the Senior Loan Committee;

3. That for those loans within the established approval limit of a loan officer, the committment date on a credit is the date of the extension of the credit or disbursement of the loan proceeds;

4. That Exhibit A attached hereto is a recapitulation of the 101 loans questioned by defendants, Kenneth R. George and Alberta W. George, as those loans which may be examples of differential prime rate pricing;

5. That as to each of the loans, the Bank, through its counsel, has reviewed the purposes as contained in the credit files on the 101 loans, and has recorded the purpose of each loan;

6. That the Bank maintains, and Kenneth R. George does not have proof contradicting the records of the Bank, that each loan is not a differential prime rate loan because of one or more of the following exceptions:

(a) Loans that are collateralized by United Kentucky Bank certificate(s) of deposit or passbook savings accounts;

(b) Loans that are subject to the usury requirements as contained in KRS 360.010;

(c) Loans for stated personal purposes;

(d) Loans that yield greater than the prime rate by fees or compensating balance agreements;

(e) Loans that are at the prime rate or greater;

(f) Loans that do not meet the definition of a commercial loan as established by Dr. Robert Auerbach, economist and expert witness for Kenneth R. George;

7. That because of the turnover of loan personnel and shortage of commercial loan officers, the reporting of loans to the Senior Loan Committee for the applicable periods was at times 180 days or greater after commitment or disbursement;

8. That those loans that are prime or prime related were made at the same rate for prime that was charged to Kenneth R. George and Alberta W. George for their prime related loans.

Agreed to by:

Barnett & Alagia
(s) By Richard Frockt
Richard Frockt
Thurman L. Sisney
1700 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 585-4131

Counsel for Plaintiff, United Kentucky Bank, Inc.

Agreed to by:

(s) Larry E. Parrish
Counsel for Defendants, Kenneth R. and Alberta W. George

APPENDIX D

JEFFERSON CIRCUIT COURT

DIVISION FOUR

No. 81 CI 09925

UNITED KENTUCKY BANK - - - - - *Plaintiff*

v.

KENNETH R. GEORGE - - - - - - *Defendant*

TRANSCRIPT OF PROCEEDINGS HEARD BEFORE HIS HONOR RICHARD A. REVELL, JUDGE OCTOBER 21ST, 1982 LOUISVILLE, KENTUCKY

Filed January 4, 1983

Appearances:

For the Plaintiff:

Mr. Richard Frockt
Thurman L. Sisney
The Fifth Avenue Building
444 S. 5th Street
Louisville, Kentucky 40202

For the Defendant:

Larry E. Parrish
2125 First Time Building
Memphis, Tennessee

Theodore Amshoff, Jr.
Starks Building
Louisville, Kentucky 40202

Reported By: Marlene Underwood

* * * * * * *

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Mr. Frockt: We tendered affidavits as to the calculation of principal and interest, Your Honor, in support of the tendered judgment.

Mr. Parrish: But I assume we have the normal ten days to respond with counter affidavits if we desire.

The Court: Oh, gosh. Now, this thing has been on for summary judgment. We've just delayed the hearing because of that argument over the 101 days, but that doesn't mean you keep getting a ten day extension on the filing of—

Mr. Frockt: Your

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Honor, there may be a real problem here, let me outline the problem facing the Plaintiff today. We've heard that the claims that have been placed forward by the Defendant, defending against this claim are in large part not substantiated by the facts. We have entitlement to judgment in excess of—on the non-Tract A properties—an amount of about 2.6 million dollars. Now, we've also learned on Monday of this week that Mr. George has taken a major asset of his, positive net worth of—

The Court: Say no more.

Mr. Frockt: Okay. And we're to come back here and—

The Court: Today is the cut off today. Today—the case was passed only to see if there was any need to take any additional proof. Usually we wouldn't even take proof on a summary judgment. As I said at the last hearing I was sticking my neck out, but I didn't know any other way to get it, get to the heart of the problem and that is simply because you

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all were saying there is some issue over these 101 loans. Now it turns out that you stipulated so you have removed the last element in the Court's mind of where any factual dispute may lie. So I'm saying well, if—the way I read this

stipulation—if that's the way the bank handled it I can't see that they've done anything wrong in the way they treated Mr. George. They have treated him in the same category as with others; except those that were in a preferred classification as you all have lineated here and spelled out in the stipulation and he doesn't fit into any of those categories so they've treated him as other commercial customers.

Mr. Frockt: Your Honor, I will tender a judgment based upon what you have stated.

The Court: Well, I think the judgment should make an adjudication to that extent that the Court makes a finding that the bank was not arbitrary in its calculation of prime interest rate. That it had a formula that

it followed, that being the four out of the eight bankers from New York that it set as a category and when four of them shifted the United Kentucky Bank shifted also and that Mr. Ken George, the Defendant, was not treated differently than other defendants in his category who were on a fluctuating prime rate loan—words to that extent. Those findings ought to be made. There ought to be—

Mr. Frockt: That's made in a stipulation, Your Honor, and that would be—that's part of the stipulation.

The Court: That's true, that is in the record already in the stipulation, yes, you're right. But in any event those are the adjudications and then the adjudication that as of the day of the filing of the petition for foreclosure there was no monetary arrearage or default as to Tract A or whatever you want to classify that. We know what we're talking about when we talk about Tract A, but you can classify it by the mortgage, the two hundred and fifty thousand dollar nine and

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three-quarters percent interest rate. And that the Court further adjudicates that the Defendant is entitled to a credit for the difference in calculation between the 360 and the 365 day method of calculation.

Those are actually the adjudications.

Mr. Parrish: There was one other that we haven't mentioned before and that's the issue concerning the illusoriness of the contract. I assume that Your Honor is saying that you find that there was a contract —

The Court: I read your case law and I can understand how some may find that illusory, but I'll tell you the way I look at that with the way interest was going back when this was calculated there's been a bunch of banks and building and loans around Louisville — I don't know about down your way, but around here there's a bunch of people sitting there on homes that they've borrowed that had no way to purchase a loan except to take one of those fluctuating rate — it's been pretty widely

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used in this community at least. The theory behind it was it would be advantageous to the bank if the interest rates went up it would be advantageous to the homeowner if the interest tumbled, but it was really an attempt to be fair to both sides, to protect them because the rate of interest was changing so rapidly that the banks just felt like they couldn't go out on a limb and make fixed rate loans at that time. And I don't see where that is illusory as long as there is some method of the Defendant coming in and being able as you have attempted to do in this case, and try to find out where that figure came from and the bank has successfully explained it or satisfactorily explained it or adequately explained it, however you want to say it, that they used leading banks or leading bankers in the country and I don't know that that's a bad way to do it. It's —

Mr. Frockt: It's a cost of funds approach, Your Honor, that's all it is. It's a cost of funds.

The Court: Cost of

funds. Well, it's an educated approach to it and they're basing their judgment on somebody else's judgment, but some — that's basically the way it's done because we all know that when some of the leading banks around the country do change the prime interest rates others seem to fall in line. So that's not illusory to the extent that at any given time a customer could walk in and say to United Kentucky what is the prime interest rate today and they could tell him. It isn't — they would say to Mr. George well for you it's 30% but for your friend down the street it's only 15%, you know. From your stipulation here, that was not the case. There was a difference for some customers but those customers were either statutorily given a different rate, the various categories you have gone through there of which he didn't fall into. So others in his category were treated the same as him and it wasn't illusory in that they calculated it on the basis of this group that they looked at of eight banks, eight bankers; when four of them changed they said

the time has now come to change and that's not illusory to my way of thinking. That's a method of calculation. They could use a lot of different formulas, but that's the formula they used and so it would give a person a basis of checking. If you had the time and patience in other words, you could check out every day that this mortgage has been in existence against the four banks or whatever in New York and follow behind United Kentucky and make sure they changed accordingly. There is no proof that they didn't do that.

Mr. Parrish: That — I'm not —

The Court: The only testimony in the record is that that's exactly the way they calculated their prime interest rate and I can't see that that's illusory. If that's illusory our whole system of banking is illusory.

Mr. Parrish: Well, anti-trust terms which is described as conscious parallel to this thing, but that aside — our argument is based on the fact

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that they did that today, they may have changed tomorrow, the contract —

The Court: They didn't take a figure out of the hat though.

Mr. Parrish: The contract doesn't pin them down to anything. They pinned themselves down outside the contract and we contend that's the legal difference.

But I understand Your Honor's ruling and I think the record is clear. I'm not questioning it.

Mr. Frockt: Thank you, Your Honor —

Mr. Amshoff: Wait a minute. We're not finished yet.

Mr. Frockt: I'm sorry.

The Court: Now we get to the good part.

Mr. Frockt: What else is there.

Mr. Parrish: Well, so the record is also clear as far as the affidavits that have been submitted to the Court to support the final judgment and

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order of sale, I saw — the final judgment and order of sale was given to me about an hour before the hearing and I had no prior knowledge that that was going to be submitted and some of the facts that are stated in there I really don't think anything in the record substantiates. He may think it does and the record, I suppose, will stand for itself. The affidavits I was given at the beginning of this hearing and I really have not even had an opportunity to read them, but as I understand Your Honor's

ruling, and that's all I'm trying to do, is be sure I understand, Your Honor is accepting the affidavits and accepting the factual predicates necessary to support the changes or the final order and judgment as you have dictated it to be today without us having the opportunity to take issue with that. I understand the local rules are that I have ten days to submit counter affidavits. That's all right if I don't. I just want to be sure that I am being prohibited by the Court from submitting counter affidavits.

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Mr. Frockt: Your Honor, let me respond very quickly. The new tendered in persona judgment is only an update of what was tendered some 95 or 120 days ago with our original motions. We tried to bring forth from —

The Court: Can we clear up a misconception. You don't have ten days from the day of the hearing. The reverse is true. The rule in Kentucky is is that the hearing can't be set any quicker, the hearing on the motion can't be set any quicker than ten days from the time of the making of the motion to give you that ten days but my golly this thing has been on my docket for not ten days but more like ten months it seems —

Mr. Parrish: But I haven't had the affidavits with which to file something.

The Court: But the point is anybody can file affidavits or counteraffidavits up to the day of the hearing.

Mr. Parrish: I had

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nothing to counter, that's all I'm saying.

The Court: Well, I suppose that's a chance you take when you walk into a hearing a motion for a summary judgment.

Mr. Frockt: Your Honor, you set this as a hearing date today.

The Court: This really —

Mr. Frockt: Mr. Parrish wants to cross-examine somebody — I'll bring somebody over here and put them in the box.

Mr. Parrish: Why do I —

Mr. Frockt: This is just every time we come up here we have some reason why it has to be delayed. We found out part of what that reason was. They have hidden five million dollars. And on behalf of the bank I'm insulted that we're now sitting here and trying to delay and delay and delay.

The Court: I'm even missing the argument because today it was passed only for one purpose and that was because at the last hearing the Defendant

raised the contention that there was still some argument over these 101 loans and the argument was made back to you that you had had sufficient time and you said no you hadn't had sufficient time and I accepted your argument because of the busy schedules of both of you, you had crossed along the way and hadn't gotten to really sit down and go over it thoroughly and I said take one more look at it. But it really was p ssed to today not for a lot of more extensive hearings or more proof or anything other than narrowed down to where do we stand on the 101 loans, that was the only remaining issue as far as I could see.

And so you've brought in now a stipulation which answers the issue over the 101 loans and I feel like it's time to wind up the lawsuit.

Mr. Frockt: If Mr. Parrish would be satisfied I will detail only the amount of principal that is now due and leave the interest to later calculations if he wants to calculate it that way.

The Court: Well, in

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any event I'm going to have to refer the judgment to the Commissioner to check the description or descriptions as the case may be and the various calculations that the Commissioner makes for the Court so it still won't be signed as of tomorrow.

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Mr. Amshoff: Insofar as—I think we're entitled to have some proof as to the divisibility of this property. Through here, this is clearly divisible. It doesn't need to be broken down and sold.

Mr. Frockt: If that's the way they want to sell it Your Honor, I think they're looking for a mistake because the problem we've all had in this—

Mr. Amshoff: We're just asking for time to study it before judgment goes down like this.

Mr. Frockt: I'll make the statement on the record if they want to sell it by the lot we will then accede to their wishes. But the problem is is that 8/10th of this subdivision is undeveloped. They don't have streets, they don't have sewers, they don't electric—

The Court: Your liable

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to hurt yourself and it may bring a lesser price, it may be more valuable somebody getting the whole things.

Mr. Parrish: But the problem is apparently—I don't know who in the bank, but somebody has come up with the thought that it would take five hundred thousand dollars to bring it up to snuff to sell it. Mr. George says that is absolute nonsense, that it wouldn't take five hundred thousand. So there is a complete difference of opinion probably from the man who knows most about the property to an expert who has evaluated it on a second-hand basis.

So I just am not prepared today to settle or to say and we could probably stay here two hours arguing about how to do it—

The Court: You might talk to them a little bit. Judgment isn't going to be entered tomorrow anyway. First of all it has to be redrafted. Then under our procedure I'm going to refer it to the Commissioner to take the time and very carefully check the legal description, the

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amount to be raised at the sale, the various things like that so it will be some time next week probably at the earliest so you will have a little time.

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CERTIFICATE

I, MARLENE UNDERWOOD, Official Reporter for the Jefferson Circuit Court, Division Four, do hereby certify that the foregoing TRANSCRIPT OF PROCEEDINGS was taken before me at the time and place as stated in the caption; that the witnesses were first duly sworn to tell the truth; the whole truth; and nothing but the truth; that the said proceedings were taken down by me in stenograph and afterwards transcribed under my direction; that it is a true, complete and correct transcript of the said proceedings so had; that the appearances were as stated in the caption.

WITNESS MY SIGNATURE this the 3rd day of January 1983.

MARLENE UNDERWOOD
Official Reporter
Jefferson Circuit Court
Division Four